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Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill, 2018) ISBN 9789004355828, 449 pages.

The passing of the UN Convention on the Rights of the Child (CRC) in 1989 moved children's rights into the political agenda. The CRC is a core human rights treaty, ratified by 196 states, setting out international human rights standards for children. Two of its aspects dominate the academic literature. One relates to its implementation. Most countries do not directly incorporate the CRC, but interpret and frame laws with the Convention in mind, which leads to inconsistency. The other relates to the meaning and effectiveness of its articles. Parties to the CRC are guided by four key principles: Article 6 protects the child's right to life and development, Article 2 prohibits discrimination. Article 3 ensures that actions taken on behalf of the child have respect to their best interests and Article 12 promotes autonomy through an evolving capacities approach and a right to be heard.

Aoife Daly's excellent book[1] focusses on Article 12. Her bold thesis is that a shift is needed from simply hearing children in proceedings about their best interests, to seeking to uphold their autonomy. Article 12, she claims, fails empirically and theoretically to uphold their rights. The book is in 8 chapters. Chapter 1 sets up the argument for a new text to Article 12(2) that incorporates notions of equality, autonomy and support. Chapter 2 defends the focus on best interests. Chapter 3 considers the limitations of autonomy, eschewing capacity as the threshold for decision-making in favour of an approach based on the avoidance of harms. Chapters 4 and 5 offers empirical backing to the contention that Article 12 is inadequate and Chapter 6 looks at how the courts should override autonomy in cases where significant harm would otherwise occur. Chapter 7 focuses on the additional requirements to produce a child-friendly process and the conclusion is in chapter 8, which lambastes Article 12 as 'vague', 'unambitious', 'toothless' and ineffective and reiterates the benefits of a greater focus on autonomy through a revised Article 12(2).

The right of children to autonomy is much disputed. Some argue that parental autonomy is all that is required to protect children's rights, or that autonomy rights abandon children to their rights.[2] Daly proposes a model that balances the best interest protection in Article 3 with meaningful protection of their autonomy interests. She sets out a new Children's Autonomy Principle:

> In legal decisions in which the best interests of the child is the primary consideration, children should get to choose – if they wish – how they are involved (process autonomy) and the outcome (outcome autonomy) unless it is likely that significant harm will arise from their wishes.[3]

Daly argues that the focus on autonomy should replace the weak and ineffective 'right to be heard' that currently dominates Article 12. 'Process autonomy' necessitates autonomy support. In other words, relevant proceedings must be carried out in a child-friendly way. Children must be properly informed in a manner they understand and which does not seek to control them, offering them choice in *how* they are involved. 'Outcome autonomy' refers to the right of the child to determine

[1] Aoife Daly, Children, Autonomy and the Courts: Beyond the Right to be Heard (Brill, 2018).
[2] Bruce Hafen, Children's Liberation and the New Egalitarianism: Some Reservations about Abandoning Youth to their Rights' Brigham Young Law Review 605–58 (1976).
[3] Daly, supra note 1, at 10.

the outcome of the proceedings. Both aspects apply only to the extent that involvement will not cause them significant harm.

In the medical law context, in which many best interests children's proceedings take place, autonomy dominates the landscape, but children are often excluded from its remit. For example, in *Montgomery v Lanarkshire Health Board*[4] the Supreme Court recognised the right of patients to make informed medical choices, but restricted the right to 'adult patients of sound mind'. Adult patients (from 16-17) who lack mental capacity are protected by the Mental Capacity Act 2005, section 3(4) of which requires provision of information relevant to a decision. If it is determined that the patient lacks capacity, then a best interests decision is required. In these circumstances, the decision must comply with section 4 which emphasises the relevance of the patient's values, likes and dislikes. In *Aintree University Hospital NHS Foundation Trust v James,*[5] the Supreme Court rejected the notion that the best interests test required an objective assessment of the patient's views. Lady Hale said:

> The purpose of the best interests test is to consider matters from the patient's point of view…. [I]nsofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.

In comparison, children's autonomy is poorly protected. As Daly notes, it is occasionally recognised in the case law, notably in the case of *Mabon* where Thorpe LJ acknowledged obligations under Article 12 of the CRC and Article 8 of the European Convention on Human Rights:

> Providing judges correctly focus on the sufficiency of the child's understanding and, in measuring that sufficiency, reflect the extent to which, in the 21st Century, there is a keener appreciation of the autonomy of the child and the child's consequential right to participate in decision making processes that fundamentally affect his family life. [6]

Thorpe LJ linked the protections of children's autonomy rights to their capacity to decide. Daly, on the other hand, makes the innovative argument that capacity is not a suitable notion for determining when best interests decisions should be made about children.[7] It leads to contradictory approaches even if the outcomes of respective decisions are comparably severe, and the concept of *Gillick* competence is contested and imprecise.[8] Instead Daly argues that the best interest test should apply regardless of capacity and that it should be modified to prioritise their autonomy.[9] Competence and capacity would be relevant factors, but the presumption in favour of the child's wishes rather than a preoccupation with their capacity would define the approach.[10]

It is clear from this book that there is much that can be learned from medical law cases and applied more broadly in best interests proceedings. In the medical law context, the General Medical Council already protects the 'process autonomy' rights of children by requiring that they should be informed in a manner 'appropriate to their age and maturity' about a range of issues including their medical

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[4] *Montgomery v Lanarkshire Health Board* [2015] AC 1430.
[5] *Aintree University Hospital NHS Foundation Trust v James* [2013] UKSC 67.
[6] Daly, supra note 1, at 30. *Mabon v Mabon and others* [2005] EWCA Civ 634, [26].
[7] Id. chapters 3 and 6.
[8] Emma Cave, Goodbye Gillick? Identifying and resolving problems with the concept of child competence, Legal Studies 103-122 (2014).
[9] Daly, supra note 1, at 93.
[10] Id. at 117.

condition, the purpose of treatment, the chances of success, different options (including no treatment) and their right to change their mind or ask for a second opinion. The GMC recognises the child's right not to be so informed if it is their wish, and that the information should be kept from the child it if would cause them 'serious harm'.[11]

However, the definition of serious or significant harm poses definitional quandaries. First, adherence to children's autonomy is dependent on the available processes: significant harm might flow from being involved in the process in circumstances when it would be beneficial for the child to determine the outcome. Second, the threshold for 'significant harm' is unclear. How must long term harm be balanced with immediate harm? How grave must the harm be in order to be considered significant? And what likelihood must there be of the harm occurring?

Having acknowledged that 'grave injury or death' is significant,[12] Daly unpacks the concept of significant harm in chapter 6. She makes the valid point that some harm is often inevitable and must be weighed against the harms caused by contradicting the child's will.[13] Utilising child protection law definitions, Daly argues that 'significant' should be taken to mean 'considerable', 'exceptional' and 'noteworthy'. However it is not clear that those synonyms provide greater clarity. Daly acknowledges 'that there are many uncertainties about predicting and determining significant harm, and little empirical research to provide guidance'.[14]

The child protection concept of significant harm is but one of a number. For example, the Human Fertilisation and Embryology Authority requires that proper account is taken of the welfare of any child who may be born as a result of assisted conception as well as any other child affected by the birth. The assessment is 'whether there is a risk of significant harm or neglect to any child'.[15] The focus on neglect here is valuable, as harm can be caused by omissions as well as acts. The HFEA lists relevant factors including the potential of serious physical or psychological harm or neglect, and also potential impediments to the prospective parent being able to care throughout childhood due to (for example) mental or physical conditions and drug or alcohol use. Would these factors reach the threshold for significant harm in a best interests case? The subjective nature of the threshold has potential to leave some children who are capable of making an autonomous and capacitous decision subject to paternalistic control in situations where an autonomous and capacitous adult would be free to decide. The justification for this distinction is unclear.

Another concern in utilising the significant harm test developed in child protection law in best interests cases is that the law has drawn a distinction between them in part to protect very young children from decisions of their parents that contravene their best interests. Daly seeks to protect *child autonomy*, but adoption of the significant harm test as part of the test to determine whether children are permitted to be involved and to choose, has potential to lead to an analogous application in the case of parental rights to choose in cases where the child is too young to make their view known. This might lead to a reduction in the protection of children and prioritisation of the rights of parents.[16] An argument might be advanced that by recognising autonomy as the

[11] GMC, Guidance 0-18 years: guidance for all doctors (2007), para 17.
[12] Daly, supra note 1, at 371.
[13] See *Mabon v Mabon* [29], per Thorpe LJ.
[14] Daly, supra note 1, at 371.
[15] HFEA, Code of Practice, 8th edition (2009), para 8.3.
[16] Emma Cave & Emma Nottingham, Who knows best (interests)? The case of Charlie Gard, Medical Law Review https://doi.org/10.1093/medlaw/fwx060 (2017).

dominant principle, parental autonomy can serve as a substitute for the child's autonomy in the event that the child is incapable of its exercise. In *King*, Baker J said:

> the State – whether it be the court, or any other public authority – has no business interfering with the exercise of parental responsibility unless the child is suffering or is likely to suffer significant harm as a result of the care given to the child not being what it would be reasonable to expect a parent to give.[17]

Counsel for Charlie Gard's parents sought to apply this so that they could take Charlie abroad for nucleoside treatment that doctors considered futile. The argument was rejected by the courts which confirmed the duty of the courts to determine the best interests of the child. There is increasing support for a harm principle to serve as the threshold for state intervention to override parental decisions and mitigate the indeterminacy of the test for best interests. But as Giles Birchley has argued, problems arise when parents make misguided attempts to protect the child and cases are not dealt with consistently.[18]

Setting aside these 'slippery slope' fears, the solution posed by Daly provides an important and insightful critique of the shortcomings of article 12 and a theoretical and practical means by which the inferior protection of child autonomy in best interests proceedings might be addressed. The book is exceptionally clear and academically rigorous - it is a pleasure to read.

The foreword of Daly's book is written by Professor Emeritus Michael Freeman, who has been a passionate and eminent advocate for children's rights for 40 years. He has examined the moral foundations of children's rights and offered insights that have helped shape the national and international discourse. His theory of 'liberal paternalism',[19] which aims to confine but not eliminate paternalism for children, strongly influenced Daly. There can be no greater accolade than his ringing endorsement and I can only concur with his view that the book 'is thorough, perceptive and novel and will set a benchmark for future analyses of children's rights in the context of the courts and beyond'.

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[17] *In the Matter of Ashya King* [2014] EWHC 2964, [31].

[18] Giles Birchley, Harm is all you need? Best interests and disputes about parental decision making, 42 Journal of Medical Ethics 111-115 (2016).

[19] Developed into a theory of 'limited paternalism': see Michael Freeman, A Magna Carta for Children? Rethinking Children's rights (forthcoming CUP).